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No.

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IN THE

Supreme Court of the United States

.... TERM 1981

EDWARD P. FITZGERALD,
Petitioner,

vs.

GUS O. NATIONS, EARL J. GATES, FRANK C. BICK, HARRY T. BUSSMANN, JR., and HUGH SCOTT, JR., Comprising the Board of Police Commissioners, St. Louis County, Missouri,
Respondents.

Petition for Writ of Certiorari To the Missouri Court of Appeals
Eastern District

BRIEF OF RESPONDENTS IN OPPOSITION

THOMAS W. WEHRLE
ST. LOUIS COUNTY COUNSELOR

ANDREW J. MINARDI
ASSOCIATE COUNTY COUNSELOR
St. Louis County Government Center
41 South Central
Clayton, MO 63105
(314) 889-2042
Attorneys for Respondents

St. Louis Law Printing Co., Inc., 411 No. Tenth Street 63101 314-231-4477

QUESTIONS PRESENTED

A. Does the First Amendment protect a police officer from being terminated from public employment when the police officer in a military or quasi-military organization makes a vitriolic personal attack on his captain by calling the captain a "damn liar" in the presence of other police officers of the captain's command at a roll call?

B. Are the Departmental rules in question constitutionally sufficient to withstand a vague and overbreath First Amendment attack?

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OPINION BELOW

The opinion of the Missouri Court of Appeals, Eastern District, entered October 28, 1980, is reported as *Fitzgerald* v. *Nations,* 610 S.W.2d 48 (Mo.App. 1980).

STATEMENT OF THE CASE

Petitioner's[1] statement of facts is not a complete and accurate statement of all the salient facts bearing on whether the instant

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[1]Petitioner, Edward P. Fitzgerald, hereinafter will be referred to as "Fitzgerald".

case merits the Court's favorable consideration toward the granting of a petition for writ of certiorari.

By letter Col. G. H. Kleinknecht, Superintendent of the St. Louis County Police Department, terminated Fitzgerald as an officer of the Department. The letter set forth the Superintendent's basis for Fitzgerald's termination which he found were violations of Article 12[2] and 33[3] of the Department's Rules and Regulations, Manual, Conduct and Discipline.

Prior to his termination on November 29, 1976, Fitzgerald was a St. Louis County Police Officer and had been such for a number of years.

Fitzgerald, a beat officer in the First Precinct, posted a "notice" on the First Precinct bulletin board which contained the assertion that there existed a "quota system" in the First Precinct. In the notice Fitzgerald stated that he would call Maj. Bergauer, Col. Kleinknecht, the Police Board, McNary, any supervisor or commander a "damn liar to their face" if they asserted there was no "quota system" in the First Precinct. The notice had written upon it "tell 'em Fitz". The bulletin board, upon which the notice was posted, was located in the roll call room where all the officers in the precinct attend roll call and receive their assignments prior to the commencement of their assignments for each watch. The bulletin board was erected at Captain Long's direction and constituted a method of disseminating official as well as other information to officers in the First Precinct.

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[2]"Article 12: INSUBORDINATE CONDUCT, that is, 12.2 Treats with contempt or is disrespectful in language or deportment toward a supervisory officer in the execution of Departmental duties."

[3]"Article 33: GENERAL ARTICLE, that is, Commits any neglect or disorder, though not specifically mentioned herein, which is to the prejudice of good order and discipline in the Department, impairs the efficiency of the Department, is in violation of any federal or state law, County or municipal ordinance, or is of a nature to bring discredit upon the Department."

At the time Fitzgerald posted the "notice" on the bulletin board, Captain Long was the First Precinct Commander. As such, he was responsible for the administration of the First Precinct and was responsible for the supervision of all officers assigned to the First Precinct. Officer Fitzgerald was under the supervision and command of Captain Long.

At a roll call in the roll call room of the First Precinct Fitzgerald, in the presence of seven other County officers of Captain Long's command, confirmed to Captain Long that the "notice" was written by him [Fitzgerald]. Captain Long then told Fitzgerald, in the presence of the other officers, that there was no quota system in the First Precinct. In response Fitzgerald, in the presence of the other officers, called Captain Long a "damn liar" and asserted there was a quota system in existence. After Fitzgerald's initial response, Captain Long informed Fitzgerald that it was a serious matter calling his commanding officer a "liar." Fitzgerald stated he would put his job on the line because there was a quota system. After Captain Long reiterated that there was no quota system in the First Precinct, Fitzgerald again called Captain Long a "damn liar" in the presence of his fellow officers at roll call. Captain Long initiated a formal complaint against Fitzgerald.

The termination letter supplied to Fitzgerald noted that Fitzgerald had previously been reprimanded for insubordination toward Major Bergauer. That reprimand was based upon Fitzgerald's written memorandum directed to Major Bergauer which was determined to be abusive, disrespectful and defiant in language. Prior to the discipline for the Bergauer incident, Fitzgerald was disciplined for refusing to attend a community relations seminar as ordered in Special Order 41-72. The Board in sustaining a violation of Department rules in this earlier discipline noted Fitzgerald's reply explaining his absence from the seminar was discourteous and disrespectful. The Board's decision quoted part of Fitzgerald's reply which was to the ef-

fect that Fitzgerald, and not the Superintendent nor the Department, was going to decide what training or seminars Fitzgerald would attend.

Subsequent to his termination, Fitzgerald timely appealed to the St. Louis County Board of Police Commissioners (hereafter the "Board") and an adversary hearing was held. The Department presented its case by offering testimony and exhibits as evidence. The Department's witnesses, in addition to recounting the "damn liar" incident, testified about the system of accountability in place at the First Precinct and described how it worked. None called it nor described it as a "quota system."

At the hearing before the Board Fitzgerald, by counsel, exercised his right of cross examination. After offering a number of exhibits, most of which were refused as being irrelevant or hearsay, Fitzgerald rested his case without calling any witnesses or testifying himself.

The Board made findings of fact and conclusions of law and entered a decision affirming the Superintendent's termination of Fitzgerald. (See Petitioner's brief Appendix C.)

The Board, among other findings, found:

> "Fitzgerald was not a 'beginner.' He was a veteran officer who seemed obsessed with the compulsion to be insubordinate and whose behavior, comments, assertions, conduct, etc. were calculated to undermine and foster distrust of the Deparment's command personnel, to hold them in disrepute, to cast aspersions on their integrity and to callously encourage by his own example insubordinate and contempt by other younger and more impresionable members of the command. The Board finds that the conduct of which he here stands charged and which has gone almost wholly unchalleneged when taken together with a previous history of insubordination and contumacy[1] show a lack [sic] working relationship and personal loyalty on

> Fitzgerald's behalf toward his immediate superiors, command personnel, the Superintendent and the Department which is so essential to this kind of activity."

Fitzgerald, dissatisfied with the Board's decision, filed a petition for review in the St. Louis County Circuit Court pursuant to Chapter 536 R.S.Mo. seeking judicial review of the Board's decision.

The circuit court entered its judgment and ruled that there was substantial and competent evidence on the record as a whole to support the decision and findings of the Board and the decision was not clearly contrary to the overwhelming weight of the evidence. Fitzgerald perfected an appeal to the Missouri Court of Appeals, Eastern District.

In affirming the circuit court's judgment and the Board's judgment, the Missouri Court of Appeals held, on the questions presented by Fitzgerald's Petition to this Court, that:

> "While the question of whether a quota system was in effect in the First Precinct is a matter of public concern, Fitzgerald was not terminated for his expressions concerning that matter. He was terminated because he called the Captain a 'damn liar.' That was a vitriolic personal attack based upon Fitzgerald's attitude that anyone holding a different viewpoint from his own is not only incorrect but mendacious. The First Amendment does not protect one from the consequences of such speech, including termination of public employment, particularly where it occurs in a military or quasi-military organization such as the police force."

* * *

"Nor do we find the regulations vague or overbroad. Much has been written on this subject matter, both by the United States Supreme Court and the Missouri Courts. It is unnecessary to repeat what has been previously written. It is sufficient to say that regulations similar and even less definite than those before us have been upheld against charges of vagueness and overbreadth particularly where, as here, the conduct charged clearly falls under the regulations, as was recognized by Fitzgerald when he stated he was putting his job on the line." *Fitzgerald* v. *Nations,* 610 S.W.2d 48, 50 (Mo.App. 1980).

Application for Transfer was denied by the Missouri Supreme Court.

ARGUMENT AGAINST GRANTING THE WRIT

A.

The Law Is Well Settled That One Can Be Held Accountable For His Or Her Conduct Or Speech To The Loss Of Public Employment. And While One Is Free To Say What He Pleases He Nonetheless Is Responsible, Accountable And Liable For What He Says And The Manner, Context, And Tenor With Which It Is Said. ***Jensen*** **v.** ***Olson,*** **353 F.2d 825 (8th Cir. 1965); See Also authorities** ***infra.***

The first amendment to the United States Constitution does not protect a police officer, such as Fitzgerald, from repercussions when the police officer tells his captain in the presence of other police officers of the captain's command that the captain is "a damn liar."

Fitzgerald fails to set forth any special and important reasons why this case should be accepted on his petition for a Writ of Certiorari.

Contrary to Fitzgerald's main assertion that the Missouri Court of Appeals improperly applied the *Pickering* balancing test [*Pickering* v. *Board of Education,* 391 U.S. 563 (1968)], the Missouri Court of Appeals noted *Pickering* in its opinion and observed that *Pickering* and United States Supreme Court decisions subsequent to *Pickering,* i.e. *Arnett* v. *Kennedy,* 416 U.S. 134 (1974) and *Parker* v. *Levy,* 417 U.S. 733 (1974), supported its decision that Fitzgerald could properly be terminated. The Missouri Court of Appeals ruled that Fitzgerald was not terminated for his expressions of public concern but was terminated because he called his captain a damn liar, conduct which the court found to be a vitriolic personal attack unprotected by the First Amendment. *Fitzgerald* v. *Nations,* 610 S.W.2d 48, 50 (Mo.App. 1980). Existing case law supports the Missouri Court of Appeals decision.

Fitzgerald's "damn liar" comments clearly went beyond any so called statement of "public concern", it was a direct vitriolic attack meant to discredit the integrity of the First Precinct commander as well as command personnel of the Department, which clearly takes the facts of this case outside of any First Amendment protection afforded by *Pickering, supra.*

In *Jenson* v. *Olson, supra,* the plaintiff was dismissed as a municipal employee. His dismissal was based upon his case reports in which he made repeated criticisms and charges relative to political influence and fraud in the welfare department as well as alleging inequities and inefficiencies within the department operation. In this context the *Jenson* Court stated:

> "Here plaintiff asserts a right to make any criticism or charges he deems warranted under the protection of the First and Fourteenth Amendments. Within the bounds imposed by the laws of libel and slander no one would deny that plaintiff has this right. Plaintiff, however, has no right to public employment. He may speak as he pleases and level charges at all suspects. But if the exercise of this privilege disrupts his own work and reduces the efficiency of the department he is subject to discharge for cause. The plaintiff has an absolute obligation to satisfactorily perform the duties and work inherent in his position. One of these duties is to conform to departmental regulations in making his investigations and reports. He may speak as he wishes but also must be responsible for his statements. When his speech is disruptive of the proper functioning of the public's business the privilege of governmental employment may be withdrawn without it being said that he was denied his freedom of speech. To hold otherwise would enable governmental employees to practice the rankest form of insubordination and safely hide behind the right of free speech." 353 F.2d at 828.

The *Jenson* Court went on to state:

> "Here plaintiff asserts a right to make any criticism or advance any charges he deems warranted and remain absolutely secure in his position. He wants the Constitution to serve as a personal protection in this dispute between himself and his superiors. It was not intended to, nor does it serve that function." *Ibid* at 829.

In the instant case there was testimony by command personnel before the Board that discipline is essential to carry out the police functions of the St. Louis County Police Department. That the St. Louis County Police Department is a quasi-military organization is without dispute both as a matter of fact and as a matter of law. See Board Findings (Petitioner's brief A-12 to A-13) and *Milani* v. *Miller,* 515 S.W.2d 412, 418 (Mo. 1974).

In *Arnett* v. *Kennedy, supra,* this Court recognized the legal principle that in certain situations a government employee can be dismissed based upon his speech without offending the First Amendment. In this context the *Arnett* Court stated:

> "The phrase 'such cause as will promote the efficiency of the service' as a standard of employee job protection is without doubt intended to authorize dismissal for speech as well as other conduct. *Pickering* v. *Board of Education,* 391 U.S. 563, 568 (1968), makes it clear that in certain situations the discharge of a Government employee may be based on his speech without offending guarantees of the First Amendment: ***" 416 U.S. at 160.

The Court in *Arnett* quoted approvingly from *Meehan* v. *Macy,* 129 U.S. App.D.C. 217, 230, 392 F.2d 822, 835 (1968), modified, 138 U.S. App.D.C. 38, 425 F.2d 469, aff'd en banc 138 U.S. App.D.C. 41, 425 F.2d 472 (1969), where that court stated:

> " '* * *We think it is inherent in the employment relationship as a matter of common sense if not [of] common law that [a Government] employee . . . cannot reasonably

> assert a right to keep his job while at the same time he inveighs against his superiors in public with intemperate and defamatory [cartoons] . . . [Dismissal in such circumstances neither] comes as an unfair surprise [nor] is so unexpected . . . as to chill . . . freedom to engage in appropriate speech.' " 416 U.S. at 161-162.

In *Parker* v. *Levy,* 417 U.S. 733 (1974), on the issue of freedom of speech, this Court said with respect to comments made by a military officer:

> "His conduct, that of a commissioned officer publicly urging enlisted personnel to refuse to obey orders which might send them into combat, was unprotected under the most expansive notions of the First Amendment." 417 U.S. at 761.

Parker v. *Levy* goes off on the need of discipline in the military. That principle of discipline was recognized and incorporated into the police field in the State of Missouri by the case of *Milani* v. *Miller, supra,* where the Court stated with reference to *Parker* v. *Levy* that:

> "We hold that the principles declaring the validity of such regulations as necessary for the discipline of the military, are also applicable to the internal regulation and discipline of a metropolitan police department." 515 S.W.2d at 418.

In *Givhan* v. *Western Line Consolidated School,* 439 U.S. 410 (1979), where this Court failed to find that the private expressions involved were unprotected by the First Amendment, this Court, nonetheless, stated:

> "Private expression, however, may in some situations bring additional factors to the *Pickering* calculus. When a government employee personally confronts his immediate superior, the employing agency's institutional efficiency may be threatened not only by the content of the employee's message, but also by the manner, time, and place in which it is delivered." 439 U.S. at 415, n. 4.

While Fitzgerald would like to have this Court believe his "damn liar" statements and related conduct were made in good faith (Fitzgerald's brief p. 12) and were statements of public concern, Fitzgerald's "damn liar" statements and his related conduct were found by the Board as well as the Missouri Court of Appeals to be a vitriolic personal attack. The Board, after hearing the testimony and reviewing the documentary evidence, concluded that:

> ". . . the conduct of which he [Fitzgerald] here stands charged and which has gone almost wholly unchallenged when taken together with a previous history of insubordination and contumacy show a lack [sic] working relationship and personal loyalty on Fitzgerald's behalf toward his immediate superiors, command personnel, the Superintendent and the Department which is so essential to this kind of activity." (Bracketed matter added.)

Fitzgerald's assertion that his "damn liar" statements could be "categorized as private" and thus protected by *Givhan, supra,* defies credulity. Statements made in the roll call room at roll call in the presence of other officers can in no sense be categorized as private.

The Missouri Court of Appeals did not misapply *Pickering* but ruled consistent with *Pickering* and its progeny. The *Pickering* balancing act, in light of the facts of this case, clearly tips the scales against Fitzgerald.

Contrary to Fitzgerald's assertion, no further direction is needed from this Court on how this case, or comparable cases, should be decided.

The Missouri Court of Appeals decision conflicts neither with *Pickering, supra,* nor with any of the Federal circuit court of appeals decisions cited by Fitzgerald. Each case turned on its salient facts none of which are comparable to those in the instant case. As noted above, this Court has set forth ample

guidelines of what is not protected speech. *Pickering, supra; Arnett, supra; Parker, supra;* and *Givhan, supra.* And the decision of the Missouri Court of Appeals in *Fitzgerald* v. *Nations, supra,* is in harmony with this Court's pronouncements.

B.

Departmental Rules Questioned In This Case Are Constitutionally Sufficient Under Previous Decisions Of This Court To Withstand A Vague And Overbreadth First Amendment Attack.

Fitzgerald complains that the regulations he was found to have violated are vague, overbroad and chill his exercise of his First Amendment rights. First, it should be noted that neither Article 12.2 nor Article 33 of the Department's rules deal with speech per se. Article 12.2 deals with conduct, including language, which "treats with contempt or is disrespectful in language or deportment toward a supervisory officer in the execution of Departmental duties." Article 33 prohibits conduct which is ". . . to the prejudice of good order and discipline in the Department, impairs the efficiency of the Department . . . or is of a nature to bring discredit upon the Department."

In *Parker* v. *Levy, supra* at 757-758, this Court refused to find certain articles of the uniform code of military justice void for vagueness or overbreadth. The Court, in so ruling, approvingly quoted the following:

> "Speech that is protected in the civil population may nonetheless undermine the effectiveness of response to command. If it does, it is constitutionally unprotected." 417 U.S. at 759.

The regulations involved in *Parker* were: "willfully disobeys a lawful command of a superior commissioned officer" and "conduct unbecoming an officer and gentleman." These regulations are not unlike the regulations in the instant case. The Missouri Court of Appeals in *Giessow* v. *Litz,* 558 S.W.2d 742, 748 (Mo.App. 1977), has previously ruled:

> ". . . the fact that the terms 'offensive conduct or language' and 'harmonious relationships' are not references to specific acts does not make them vague *per se*. Courts have recognized the necessity of broad range regulations and 'catchall' phrases, particularly in situations where the regulation is applied to a large population undertaking disparate tasks from which a diversity of situations may arise. *Arnett* v. *Kennedy, supra; Parker* v. *Levy,* 417 U.S. 733, 94 S.Ct. 2547, 41 L.Ed.2d 439 (1974). More specifically, a standard is not vague if the code is set out in terms which an ordinary person exercising common sense can sufficiently understand and comply with without sacrifice to the public interest."

It is interesting that Fitzgerald continues to raise the issue that the regulations are vague and contain no standards when he, at the time he made his first "damn liar" statement to Captain Long, recognized the seriousness of what he was doing for he stated he would put his job on the line before he called his captain a liar for the second time.

The Missouri Court of Appeals on the issue of vagueness and overbreath noted and ruled below:

> "Nor do we find the regulations vague or overbroad. Much has been written on this subject matter, both by the United States Supreme Court and the Missouri Courts. It is unnecessary to repeat what has been previously written. It is sufficient to say that regulations similar and even less definite than those before us have been upheld against charges of vagueness and overbreadth particularly where, as here, the conduct charged clearly falls under the regulations, as was recognized by Fitzgerald when he stated he was putting his job on the line. *See Arnett* v. *Kennedy, supra; Milani* v. *Miller, supra; Giessow* v. *Litz,* 558 S.W.2d 742 (Mo.App.1977); *Miller* v. *Whaley,* 581 S.W.2d 916 (Mo.App.1979)." *Fitzgerald* v. *Nations, supra* at 50.

The Departmental rules questioned by Fitzgerald are constitutionally sufficient to withstand a vague and overbreadth First Amendment attack.

CONCLUSION

Not having shown the necessary special and important reasons why this Court should exercise its judicial discretion to grant a Petition for Writ of Certiorari in this case and in view of the well settled law, the Petition should be denied.

Respectfully submitted,

THOMAS W. WEHRLE
ST. LOUIS COUNTY COUNSELOR

ANDREW J. MINARDI
ASSOCIATE COUNTY COUNSELOR
County Government Center
41 South Central
Clayton, MO 63105 - (314) 889-2042
Attorneys for Respondents